UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN DIRECTIONAL BORING, INC. d/b/a ADB UTILITY CONTRACTORS,)	
Respondent,))	Cases: 14-CA-27386 14-CA-27570
and)	14-CA-27677
LOCAL 2, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,)	
Charging Party Union.)	

RESPONDENT'S SUPPLEMENTAL PLEADING REGARDING CHANGED CIRCUMSTANCES RELEVANT TO THE BARGAINING ORDER

COMES NOW Respondent ADB Utility Contractors, Inc. d/b/a ADB Utility Contractors ("ADB"), and for its Supplemental Pleading Regarding Changed Circumstances Relevant to the Bargaining Order in the above-captioned matters, states as follows:

TABLE OF AUTHORITIES

Courts:

Avecor, Inc. v. N.L.R.B., 931 F.2d 924 (D.C. Cir. 1991), cert. denied, 502 U.S. 1048 (1992)3,
Charlotte Amphitheater Corp. v. N.L.R.B., 82 F.3d 1074 (D.C. Cir. 1996)
Cogburn Health Center v. N.L.R.B., 437 F.3d 1266 (D.C. Cir. 2006)
Douglas Foods Corp. v. N.L.R.B., 251 F.3d 1056 (D.C. Cir. 2001)
Exxel/Atmos, Inc. v. N.L.R.B., 147 F.3d 972 (D.C. Cir. 1998), cert. denied,
528 U.S. 1067 (1999)
<u>Flamingo Hilton-Laughlin v. N.L.R.B.</u> , 148 F.3d 1166 (D.C. Cir.1998)
<u>Impact Industries, Inc. v. N.L.R.B.</u> , 847 F.2d 379 (7 th Cir. 1988)
Lee Lumber and Building Material Corp. v. N.L.R.B., 117 F.3d 1454 (D.C. Cir. 1997) 3
N.L.R.B. v. Cell Agricultural Manufacturing Co., 41 F.3d 389 (8 th Cir. 1994)
N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969)
N.L.R.B. v. Jamaica Towing, Inc., 632 F.2d 208 (2 nd Cir. 1980)
United Steel Workers of America v. N.L.R.B., 482 F.3d 1112 (9 th Cir. 2007)
National Labor Relations Board:
<u>Abramson, LLC</u> , 345 NLRB No. 8 (N.L.R.B. 2005)6
Audubon Regional Medical Center, 331 NLRB No. 42 (N.L.R.B. 2000)5,9
<u>Avecor, Inc.</u> , 293 NLRB No. 99 (N.L.R.B. 1992)7
<u>Cooper Industries, Inc.</u> , 328 NLRB No. 21 (N.L.R.B. 1999)
Research Federal Credit Union, 327 NLRB No. 182 (N.L.R.B. 1999)8,9
Wallace International de Puerto Rico, Inc., 328 NLRB No. 3 (N.L.R.B. 1999)5,6,9

LEGAL ARGUMENT

The United States Supreme Court has recognized that "secret elections are generally the most satisfactory - indeed the preferred - method of ascertaining whether a union has majority support." N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 602 (1969). As Gissel instructs, "effectuating ascertainable employee free choice [is] as important a goal as deterring employer misbehavior." Gissel Packing Co., 395 U.S. at 614. On the other hand, as recently as April 2, 2007, a Circuit Court has acknowledged the well-established principle that a Gissel bargaining order is an "extreme remedy" that is warranted only under unusual scenarios. United Steel Workers of America v. N.L.R.B., 482 F.3d 1112, 1117 (9th Cir. 2007). Indeed, a bargaining order "is not a snake oil cure for whatever ails the workplace; it is an extreme remedy." Avecor, Inc. v. N.L.R.B., 931 F.2d 924, 938-39 (D.C. Cir. 1991).

There is also overwhelming judicial authority that the relevant time to consider the appropriateness of a bargaining order is *at the time the order is issued*, as opposed to the time that the violation occurred. *See*, *e.g.*, Cogburn Health Center v. N.L.R.B., 437 F.3d 1266, 1272-73 (D.C. Cir. 2006)(NLRB should not have imposed bargaining order given changed circumstances in the form of lapse of time and significant employee and management turnover); Douglas Foods Corp. v. N.L.R.B., 251 F.3d 1056, 1067 (D.C. Cir. 2001)(NLRB required to consider changed circumstances no matter what their cause); Flamingo Hilton-Laughlin v. N.L.R.B., 148 F.3d 1166, 1170-71 (D.C. Cir. 1998)(appropriateness of bargaining order must be determined in light of the circumstances existing at the time it is entered); Lee Lumber and Building Material Corp. v. N.L.R.B., 117 F.3d 1454, 1462 (D.C. Cir. 1997)(questioning the continuing appropriateness of a bargaining order in light of the passage of time); Charlotte Ampitheater Corp. v. N.L.R.B., 82 F.3d 1074, 1080 (D.C. Cir. 1996)(employer must be allowed

the opportunity to introduce evidence of changed circumstances that would mitigate the need for a bargaining order); N.L.R.B. v. Cell Agricultural Manufacturing Co., 41 F.3d 389, 397-99 (8th Cir. 1994)(adopting the overwhelming majority view that NLRB must consider any change of circumstances when deciding whether to issue a bargaining order); Avecor, Inc. v. N.L.R.B., 931 F.2d 924, 936-37 (D.C. Cir. 1991)(changed circumstances may render a bargaining order untenable), *cert. denied*, 502 U.S. 1048 (1992); Impact Industries, Inc. v. N.L.R.B., 847 F.2d 379 (7th Cir. 1988)(Board erred by failing to consider evidence of changed circumstances when determining whether bargaining order is appropriate); N.L.R.B. v. Jamaica Towing, Inc., 632 F.2d 208, 216 (2nd Cir. 1980)(remanding with directions to NLRB to elicit evidence of changed circumstances).

The courts disdain for the NLRB's failure to consider changed circumstances has become readily apparent:

In remanding the NLRB's decision to impose a bargaining order, we cannot help but feel a sense of $d\acute{e}j\grave{a}vu$.

The Board, inexplicably, has once again defied the law of this circuit and failed to offer an adequate justification for the bargaining order sanction imposed against [the Company]. We therefore find ourselves in the all-too-familiar position of having to remand this case to the Board for adequate justification of the proposed affirmative bargaining order, thus further delaying relief for the employees the Board purports to protect.

On no fewer than seven occasions in the past seven years alone we have remanded inadequately justified bargaining orders. Eight is enough.

Time and again this Court has been required to overturn NLRB orders that violate the explicit requirements of our precedent. Case law in our circuit is as clear as it could be on this question. The Board, however, continues to ignore us. We continue to reverse. We persist not out of pique but from a sense that it is our duty to ensure that the Board adheres to its statutory mandate. The Board's consistent refusal to fulfill its legal obligation to provide sufficient justification for its bargaining orders will not prevent us from fulfilling our obligation to apply the law. So long as the Board persists on its current course we have no choice but to remand each offending order. We reiterate this sentiment here, hopefully for the final time.

Douglas Foods Corp. v. N.L.R.B., 251 F.3d at 1067 (internal citations omitted).

Perhaps the most well-reasoned analysis regarding the questionable logic underlying a bargaining order is the following:

In no other area of our enlightened democratic society would we permit an elitist bureaucracy to deprive citizens of their rights as free actors on the theory that they might have been so deceived by others of differing interests that they cannot by their free choice determine their best interests, but must be subjugated to the decision of an administrative agency. While we can conceive of a commission regulating corporations tossing out the election of a corporate board based on deceit practiced against the shareholders, no one has ever suggested that such a commission could then impose indefinitely on the shareholders an unelected board, on the rationale that shareholder votes thereafter would be the product of "tainted" decisionmaking. We might even imagine an election of a public official being overturned because of fraud, but it is surely inconceivable that a board or commission could then impose its own choice of congressman, senator, or governor because of some continuing taint. Nonetheless, the NLRB persists in its elitist belief that those of the working class cannot be trusted to reject deceit on their own, and that, therefore, their benevolent big brother must watch after them.

Exxel/Atmos, Inc. v. N.L.R.B., 147 F.3d 972 (D.C. Cir. 1998)(Sentelle, J., concurring)(internal citations omitted), *cert. denied*, 528 U.S. 1067 (1999).

In light of the overwhelming agreement amongst the Courts on this issue, the National Labor Relations Board has adopted the approach of the Courts when the circumstances of the case were appropriate. For instance, in <u>Audubon Regional Medical Center</u>, 331 NLRB No. 42 (N.L.R.B. 2000) the Board granted the employer's motion to reopen the record to receive evidence of changed circumstances. <u>Id</u>. at p.6-7. In so doing, the Board recognized that "a bargaining order would likely be unenforceable in the courts" given the significant changed circumstances between the time that the ALJ imposed a bargaining order and the time of the Board's decision. <u>Id</u>. at p.6. The Board also noted that employee rights would be better served by directly proceeding to an election rather than further litigation and delay over the propriety of a bargaining order. <u>Id</u>. See also <u>Wallace International de Puerto Rico, Inc.</u>, 328 NLRB No. 3 at

*2 (N.L.R.B. 1999)(employee rights better served by proceeding directly to election); <u>Cooper Industries</u>, <u>Inc.</u>, 328 NLRB No. 21 at *3 (N.L.R.B. 1999)(employee rights better served by proceeding to election rather than further litigation over whether bargaining order warranted). Similarly, Member Schaumber has expressly stated that he will consider passage of time and delay when considering the continuing validity of a bargaining order. <u>Abramson</u>, <u>LLC</u>, 345 NLRB No. 8 at *12 fn.25 (N.L.R.B. 2005)(reversing a Gissel order and ordering an election).

RESPONDENT'S CHANGED CIRCUMSTANCES

The courts have clarified that evidence regarding (1) employee turnover, (2) management turnover, and (3) the passage of time between the unlawful conduct and the present are relevant evidence regarding changed circumstances when considering the continued appropriateness of a bargaining order. N.L.R.B. v. Cell Agricultural Manufacturing Co., 41 F.3d 389, 398 (8th Cir. 1994). As applied to Respondent, each of these factors militates in favor of an election.

1. Employee turnover

ALJ Schlesinger found that there were fifty nine (59) employees in the bargaining unit on April 15, 2003 – i.e. the date that the Union obtained thirty three (33) authorization cards and thereby purportedly achieved majority status. Decision at p. 31. Since that time, Respondent's operations and workforce has changed significantly.

Respondent currently employs twenty nine (29) individuals at its St. Louis, Missouri location. See Affidavit of David Fischer at ¶ 2, attached hereto as **Exhibit 1** and incorporated herein by reference. Additionally, excluding the thirteen alleged discriminatees, *not a single employee* that signed an authorization card remains employed by Respondent. Fischer Aff. at ¶ 4.

Moreover, the present worldwide economic crisis provides further justification that the passage of time in this case is significant. Indeed, can the Board be certain that even the individuals who signed authorization cards over (7) years ago would likewise support a union today? Is the current economic climate one in which it would always be wise for employees to aggressively confront an employer about wage and benefit increases when companies worldwide are jettisoning jobs at a record pace and unions (e.g. United Auto Workers Union and the Big 3 Auto Makers) are voluntarily agreeing to unprecedented concessions in an effort to save jobs? The simple and democratic way to answer these questions is via a secret ballot election, rather than foisting the IBEW upon this group of employees who may or may not support it.

In this regard, the present facts are similar to <u>Cogburn Health Center, Inc. v. N.L.R.B.</u>, 437 F.3d 1266 (D.C. Cir. 2006) in which the Court found significant changed circumstances where only 44% of the employees who were employed by the Company during the Union organizing campaign remained employed as of the date of the Board's Order. Additionally, only 30% of the employees that signed authorization cards remained employed by the Company as of the date of the Board's Order. Accordingly, the Court reversed the Board's imposition of a bargaining order. The same result is appropriate herein.

2. Management turnover

ALJ Schlesinger identified eight (8) of Respondent's managerial employees that engaged in various alleged acts of discrimination.¹ However, only two (2) of these individuals (i.e. Ernie Nanney and Kevin Sellers) remain employed at Respondent's St. Louis, Missouri facility.² Fischer Aff. at ¶ 6. Additionally, the individual that was found to have committed the majority of the alleged most significant violations – Chris Eirvin – is no longer employed by Respondent. Fischer Aff. at ¶ 5.

This case is factually similar to <u>Flamingo Hilton-Laughlin v. N.L.R.B.</u>, 148 F.3d 1166, 1170-71 (D.C. Cir. 1998) in which the Court rejected a bargaining order where 14 of the 21 supervisors that were found to have committed unfair labor practices, including the two most culpable supervisors, were no longer employed by the Company. *See also* <u>Cogburn</u>, 437 F.3d at 1266 (reversing the NLRB where "[t]he Board summarily discounted the departure of two of the most prominent executives of the Company, who were significantly responsible for approximately 15 ULPs, five of the 15 instances of unlawful interrogations, and four of the six discharges. The Board undertook no analysis of the effect these changes might have had on the employees and, instead, merely concluded that, because two management officials still remained, a bargaining order was the appropriate remedy."); <u>Research Federal Credit Union</u>, 327 NLRB No. 182 at *3 (N.L.R.B. 1999)(Board noted a 76.5% turnover in managerial personnel in rejecting a bargaining order due to changed circumstances).

¹ Specifically, these employees were (1) Chris Eirvin (p.2-4), (2) Ernie Nanney (p.4), (3) Rich Robinson (p.4), (4) Kevin Sellers (p.8), (5) Mike Stankewitz (p.18), (6) Ed Eirvin (p.18), (7) Mike McElligott (p.28), (8) Ray Door (p.29).

² Respondent employs Mike Stankewitz as a Superintendent in Kansas City, Missouri. Fischer Aff. at ¶ 8. All other managerial employees that engaged in alleged acts of discrimination are no longer employed by Respondent. Fischer Aff. at ¶ 6.

3. Passage of time

The alleged unfair practices at Respondent's facility occurred between April – November 2003. Thus, approximately seven (7) years have elapsed since commission of the unfair labor practices and the present. This case has been significantly delayed, primarily because of (i) the Board's decision to reconsider the meaning of the terms "assign," "responsibility to direct," and "independent judgment" as those terms are used in § 2(11), and (ii) the lack of authority of a two-member Board to issue decisions. The Board has previously found that it was particularly appropriate to consider changed circumstances where, as here, there is a "delay of the case here at the Board." Wallace International de Puerto Rico, Inc., 328 NLRB No. 3, at *2 (N.L.R.B. 1999)(5-years); Cooper Industries, Inc., 328 NLRB No. 21 at *3 (N.L.R.B. 1999)(5-years). Additionally, the Board's finding in its Supplemental Decision and Order that "the length of time this case has been with the Board is consistent with the ordinary course of litigation" can surely no longer be accurate.

Furthermore, it is entirely plausible that that the present lapse in time could drag on for several additional years before the issue regarding the appropriateness of the bargaining order in this case is fully adjudicated before the Board and Court of Appeals. Numerous courts have held that shorter periods of time are sufficient in order to reverse a bargaining order. *See*, *e.g.*, Audubon Regional Medical Center, 331 NLRB No. 42 at *5 (N.L.R.B. 2000)(more than four (4) years elapsed between union demand of recognition and company's motion to reopen record); Wallace International de Puerto Rico, Inc., 328 NLRB No. 3, at *2 (N.L.R.B. 1999)(approximately five (5) years between date of election and Board's rejection of bargaining order and direction of second election).

WHEREFORE, Respondent respectfully request that the Board consider the evidence set forth herein regarding the continued validity of the bargaining order in light of Respondent's changed circumstances, declare that the bargaining order in this case is no longer appropriate given the significant changed circumstances that have occurred at Respondent, and for such other and further relief as the ALJ deems just and appropriate.

Respectfully submitted,

McCARTHY, LEONARD, KAEMMERER, L.C.

/s/ Bryan M. Kaemmerer
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed electronically with the National Labor Relations Board, Office of the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570 and a true copy of the foregoing was sent by electronic mail this 17th day of August 2010 to:

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/s/ Bryan M. Kaemmerer

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN DIRECTIONAL BORING, INC.)
d/b/a ADB UTILITY CONTRACTORS,)
)
Respondent,) Cases: 14-CA-27386
•) 14-CA-27570
and) 14-CA-27677
)
LOCAL 2, INTERNATIONAL BROTHERHOOD)
OF ELECTRICAL WORKERS, AFL-CIO,	,)
)
Charging Party Union.)

AFFIDAVIT

COME NOW David Fischer, who, upon his oath and while duly sworn, states that he has personal knowledge of the facts herein set forth.

- 1. My name is David Fischer. I am an individual over the age of eighteen (18) years.
 - 2. I am the Treasurer at Respondent American Directional Boring, Inc. ("ADB").
- 3. Respondent ADB presently employs twenty nine (29) employees at its St. Louis, Missouri facility.
- 4. I have reviewed General Counsel's Exhibit 79, which is a set of authorization cards signed by Respondent ADB's employees. Excluding the thirteen (13) alleged discriminates, no other employees who signed cards remain employed by Respondent ADB. Clifford A. Williams a/k/a Tony Williams (who was employed as of July 10, 2007 when Respondent ADB submitted its first evidence regarding changed circumstances) ceased employment at Respondent ADB on October 13, 2007.



- 5. The following managers that ALJ Schlesinger identified as engaging in acts of discrimination are no longer employed by Respondent ADB: Chris Eirvin, Rich Robinson, Ed Eirvin, and Mike McElligott.
- 6. Ernie Nanney and Kevin Sellers are still employed by Respondent ADB at its St. Louis, Missouri facility.
 - 7. Ray Door is still employed by Respondent ADB at its Union, Missouri facility.
- 8. Respondent employs Mike Stankewitz as a Superintendent in Kansas City, Missouri.

Further affiant sayeth not.

VERIFICATION

COMES NOW David Fischer, Affiant herein, who, upon his oath and while duly sworn, states that he has read the foregoing Affidavit and further states that the facts and matters recited therein are true, accurate and correct to the best of her knowledge, information and belief.

David Fischer

Subscribed and sworn to before me this 13th day of August 2010.

Notary Public

My Commission Expires: $\frac{12}{11}$

D. WOOO

NOTARY

PUBLIC

PUBLIC

NOTARY

SEAL

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**OF MISSON